We shall refer only to one case. In Farish & Co. *v.* Reigle, 11 Grat. 697, 62 Am. Dec. 666, there was a verdict and judgment for the plaintiff for $9,000. In that case the plaintiff was injured by the overturning of a stagecoach. His head was severely cut, and one of his legs was broken above the ankle, and at the time of the trial, which occurred about one year after the accident, his leg was not entirely healed and was shortened, the ankle joint was swollen and stiff, and he was obliged to use crutches. The attending physician expressed the opinion that he would be a cripple for life. The court held that the verdict in such a case could not be disturbed, unless the damages allowed were so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case.

The fifth assignment of error is to the giving of instructions asked for by the plaintiff, and the refusal to give instructions Nos. 2 and 3, asked for by the defendant.

Without going into a particular discussion of the instructions, we are of opinion that there is no error in the instructions given; that they fully covered the case, and were sufficient to enable the jury correctly to apply the evidence; and that, even though defendant's instructions were in themselves free from objection (about which we express no opinion), the refusal to give them was, under such circumstances, harmless error.

With respect to the evidence, we find that it was ample to support the averments of the declaration; and upon the whole case we are of opinion that there was no error to the prejudice of the plaintiff in error, and the judgment is affirmed.

Affirmed.

Note.

See extensive note to Chesapeake & O. Ry. Co. *v.* Paris' Adm'r, Va. Law Reg. February 1908, p. 786.

WHITE *v.* COMMONWEALTH.

Jan. 16, 1907.

[59 S. E. 1101.]

1. Indictment and Information—Language of Statute.—On a prosecution for unlawfully selling liquor in the county of Mathews, contrary to Acts 1901-02, p. 765, c. 653, an indictment charging the offense in the terms of the statute was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 289-294.]

2. Intoxicating Liquors—Indictment—Sufficiency.—On a prosecution under Acts 1901-02, p. 765, c. 653, being an act to suppress the unlawful sale of liquor in Mathews county, the indictment was not insufficient because it did not state the place within the county at which the sale was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 227.]

3. Criminal Law—Trial—Evidence—Election.—Where the indictment charged defendant with unlawfully selling liquor within the two years last past in Mathews county, contrary to Acts 1901-02, p. 765, c. 653, it was not error to refuse to compel the state to elect on what day within the two years the offense was committed.

4. Intoxicating Liquors—Prosecutions—Evidence.—Acts 1901-02, p. 765, c. 653, being an act to suppress the unlawful sale of liquor in Mathews county, provides that the fact that any person has a license as a retail liquor dealer from the United States and no such license from the state shall be evidence of selling by retail without a state license, and that the fact that a person has such a United States license may be proved by the evidence of the internal revenue collector for the district or any of his deputies who know the fact, or by any person who has seen the license. Held that, on a prosecution under the statute, it was not error to permit the state to prove the issuance of a United States license to defendant by introducing a certificate of the collector of internal revenue showing that a license had been granted to defendant, which certificate was authenticated by a certificate of the United States district judge and a certificate by the clerk of the court.

5. Same—Instructions.—Where, on a prosecution charging defendant with having sold liquor at retail contrary to the statute within the two years last past, the only showing made by the commonwealth was evidence that defendant had had a United States license covering only the last eight months of the two years, an instruction that, if defendant held a license from the United States within two years last past, it would be evidence of selling liquor by retail, but that the jury must believe that defendant had sold it within the two years last past, was erroneous.

6. Same.—The probative value of the evidence of the issuance of a United States license is to be determined in connection with all the other evidence in the case.

7. Same.—The question as to the probative value of the evidence of the issuance of a United States license is a question primarily for the jury.

Error to Circuit Court, Mathews County.

J. T. White was convicted under Acts 1901-02, p 765, c. 653, of unlawfully selling liquor in Mathews county, and he brings error. Reversed, and remanded for a new trial.

J. N. Stubbs, for plaintiff in error.
The Attorney General, for the Commonwealth.

KEITH, P. White was indicted under "An act to suppress tippling houses, the illegal and unlawful sale or traffic in ardent spirits, in the county of Mathews, and to provide a penalty therefor." Acts of Assembly 1901-02, p. 765, c. 653.

The indictment is in the following words: "The jurors of the commonwealth of Virginia, in and for the body of the county of Mathews, and now attending said court at its March term, 1907, upon their oath present that J. T. White, in said county and within the two years last past, did unlawfully and without a state license so to do, sell spirituous or malt liquors, whisky, brandy, wine, ale, beer, or some mixture thereof, alcoholic bitters, bitters containing alcohol, or some mixtures, preparations or liquors which will produce intoxication, against the peace and dignity of the commonwealth. * * *"

A demurrer to this indictment was overruled, a plea of not guilty entered, upon which the jury rendered a verdict of guilty, and assessed a fine of $250, and to the judgment upon that verdict a writ of error was awarded by this court.

The first error assigned is to the judgment of the court upon the demurrer.

The indictment follows the statute, and this is sufficient.

In Commonwealth *v.* Young, 15 Grat. 664, it is said: "It is generally proper and safest to describe the offense in the very terms used by the statute for the purpose. But it is sufficient to use in the indictment such terms of description as that, if true, the accused must of necessity be guilty of the offense described in the statute."

The specific objection taken to this indictment is that it does not state the place at which the sale was made, and Arrington's Case, 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242, is relied upon; but that is of a class of cases such as Head's Case, 11 Grat. 819, Boyle's Case, 14 Grat. 674, and Young's Case, *supra,* in which the place was of the essence of the offense. In Head's Case, for instance, the indictment was for the selling of ardent spirits by retail, without a license, to be drunk where sold. The court held that it was not sufficient to state that the sale was in the county, but the place in the county where the sale was made must be set out, in order that the defendant might make a satisfactory defense. The prosecution took place under section 18, c. 38, of the Code of 1849, which provides that, "if any person shall, without paying such tax and obtaining such certificate as is prescribed by the fourteenth section, sell, by retail, wine, ardent spirits, or a mixture thereof, to be drank in or at the store, or other place of sale, he shall, unless he be licensed to keep an ordinary at such store or place, forfeit thirty dollars." The court, in its opinion,

says: "The grand jury intended to present an offense against the latter clause of this statute. This offense is local in its nature. Place is of its essence, and yet no place is alleged but the whole county. A sale of ardent spirits by an unlicensed dealer, not to be drunk at the place of sale, would fall within the first clause of the section above cited. The identity of the place at which the spirits were to be drunk with the place at which they were sold enters into and forms part of the offense under the latter clause of the statute. If this be so, the defendant should be apprised of the place alleged, so that he may be prepared with proof, if any he have, to show that the place of sale and that of drinking are not the same."

Boyle's Case, *supra*, has no particular bearing upon this point, and Young's Case appears to be an authority in favor of the judgment here.

The demurrer was properly overruled.

The indictment charges the offense to have been committed within "two years last past," and the accused asked that the commonwealth be required to elect on what day within the two years the offense was committed for which it would prosecute. The refusal of the court to do this is assigned as error.

In support of this assignment, the case of Hatcher & Shaw *v.* Com., 106 Va. 827, 55 S. E. 677, is relied upon. It was there held that where upon the trial of an indictment containing a single count, charging the defendant with the illegal sale of liquor to certain designated parties "at divers times within the last 12 months," evidence has been received tending to show a number of distinct sales covering a period of several months, the commonwealth may be required, before the prisoner opens his defense, to elect on which of the sales it will proceed—a very different case from the one under consideration.

This assignment of error is without merit.

During the progress of the trial, the commonwealth introduced the following paper:

"I, M. K. Lowry, collector of internal revenue for the Second district of Virginia, do hereby certify that record 10, in this office, discloses the fact that the following persons paid special tax as retail liquor dealers and retail malt liquor dealers in the county of Mathews, state of Virginia, on the dates and for the periods hereinafter set forth, and that special tax stamps were issued them as per the numbers given, viz., * * * and J. T. White, New Point, Va., as R. M. L. D. for the period of 11 months ending June 30th, 1907, stamp No. 13,472.

"Witness my hand and seal of office this the 6th day of March, 1907.

"[Seal.] M. K. Lowry, Collector.

"United States of America, Eastern District of Virginia:

"I, Edmund Waddill, Jr., United States district judge within and for the Eastern district of Virginia, do hereby certify that M. K. Lowry, whose name is attached to a certain certificate purporting to be a record of special taxpayers in Mathews county, in the Second collection district of Virginia, hereto attached, certified as a copy from record No. 10 in his office, is and was at the time of signing such certificate collector of internal revenue of the United States for the Second district of Virginia, which said district comprises, among other countries, the county of Mathews; that his said signature thereto is, I believe, his genuine signature, and his acts as such collector are entitled to full faith and credit.

"This certificate is made pursuant to section 906 of the Revised Statutes of the United States.

Edmund Waddill, Jr.,
"United States District Judge."

The clerk of the court then certifies under the statute that the Honorable Edmund Waddill, Jr., was the duly qualified district judge of the United States for the Eastern district of Virginia.

By section 5 of the act before cited for the suppression of the sale of ardent spirits in the county of Mathews it is provided "that the fact that any person, firm, or corporation, or joint-stock company have a license as a retail liquor dealer from the United States of America, and no such license from the state of Virginia as such dealer, shall be evidence of selling by retail at said place without a state license so to do, and the fact that a person has such United States license may be proved by the evidence of the internal revenue collector for said district, or any of their deputies who know the fact, or by any person who has seen said license."

The contention is that the fact that the United States license had been procured was not in this case proved in the manner provided for by this statute, which is true. It was proved, however, in a lawful manner, and we presume that the Legislature, by stating the manner in which it might be proved, did not intend to exclude any lawful proof of the fact, but rather that its purpose was to provide additional modes of proof. The mode adopted in this case was the most certain and convenient, and could not have prejudiced the accused.

The only evidence introduced upon the trial by the commonwealth was this paper, above referred to. The only evidence introduced by the defendant was his own testimony—that he was 75 years of age, was a native of Accomac county, and had resided in Mathews county for 53 years; that he had not sold any intoxicating liquors within the past two years from March 18, 1907; that he had sold sweet cider; that he was the father of 19 children; and that his youngest child was 5 years of age.

When the testimony was all in, the court gave to the jury the following instruction: "The court instructs the jury that when spirituous or malt liquors, or any mixtures, preparations, or liquors which will produce intoxication, are parted with, and any pay, compensation, or consideration is left, given, or conveyed to the person, or to another at the place, or if any understanding or agreement therefor is tacitly or expressly agreed on, whether done directly or indirectly, or whether it be nominally for another's benefit or consideration, it shall be deemed a sale within the intent of the law; but the court further instructs the jury, if they believe from the evidence that J. T. White, the accused, held a license as a retail malt liquor dealer from the United States government within two years last past from the 18th of March, 1907, the possession of such license shall be evidence of selling malt liquor by retail, but before the jury shall convict the accused they must believe beyond all reasonable doubt from the evidence in this prosecution that he sold malt liquor within two years last past from the 18th day of March, 1907."

The giving of this instruction is one of the errors assigned.

The offense here charged is that the plaintiff in error sold intoxicating liquors within two years last past from the 18th day of March, 1907, in the county of Mathews. It was no offense to have in his possession a United States government license. The office of the government license was to prove the unlawful sale of ardent spirits. Now this license only came into operation on the 31st day of July, 1906; whereas, the "two years last past" from the date of the indictment would go back to the 18th of March, 1905. There was a period, then, from March, 1905, to the 31st day of July, 1906, within which the offense might have been committed, and under the instruction the jury might have found the accused guilty; and, if such had been the case, it would have been without a shadow of testimony, for there was no independent evidence of the offense. The only evidence is the effect which, by virtue of the statute, is attributed to a license from the government of the United States, and that could not have been *prima facie* evidence, except during the eleven months from the 31st of July, 1906, to the 30th of June, 1907. It covered, therefore, only something less than eight months of the two years preceding the 18th of March, 1907.

In giving this instruction we are of opinion that the circuit court erred.

In Young's Case, *supra*, it is said: "If the indictment may be true, and still the accused may not be guilty of the offense described in the statute, the indictment is insufficient." And the same is true of an instruction.

The court tells the jury here that the possession of a retail liquor license within two years last past from March 18, 1907,

shall be evidence of selling malt liquors by retail, and yet all that is stated in that instruction may be true, and doubtless was true, without there being a scintilla of evidence against the accused, to be deduced from the license or otherwise, between the 18th day of March, 1905, which is the beginning of the "two years last past" from the 18th of March, 1907, as set out in the instruction, and the time when the license went into effect, which was eleven months prior to the 30th of June, 1907, to wit, on the 31st of July, 1906.

The statute prescribes that the possession of a United States license shall be evidence of selling by retail at the place named in the license; but the probative value of such evidence is to be determined in connection with all the other evidence in the case, and is a question primarily for the determination of the jury, with respect to which we for the present express no opinion.

For these reasons, the case must be reversed, and remanded for a new trial.

Reversed.

Note.

Issuance of United States License as Evidence.

Admissibility.—It appears to be a well settled rule that in a prosecution for selling intoxicating liquors in violation of state laws, the fact that the defendant kept in his place of business a United States internal revenue stamp, or a "government license," for the sale of intoxicating liquors, may be received in evidence as a circumstance tending to show that defendant was engaged in the business of selling intoxicating liquors. Pitner *v.* State (37 Tex. Crim. Law 268), 39 S. W. 662; Henderson *v.* State (Tex.), 39 S. W. 116; Terry *v.* State (Tex.), 79 S. W. 317; Treue *v.* State (Tex.), 44 S. W 829; Park *v.* State (Tex.), 98 S. W. 243; Gersteman *v.* State, 35 Tex. Crim. Law 318, 33 S. W. 357; State *v.* Spaulding, 60 Vt. 228, 14 Atl. 228; State *v.* Dowdy (N. C.), 58 S. E. 1002; State *v.* Toler (N. C.), 58 S. E. 1005; Frudie *v.* State (Neb.), 92 N. E. 320.

As is also the fact that the defendant made application under the federal revenue laws for a license to act as a retail liquor dealer for a period covering the time of such sales. State *v.* Munch, 57 Mo. App. 207.

But it is not competent to show a revenue license, unless it is shown that it covered the date of sale. Snider *v.* State, 78 Miss. 366, 29 So. Rep. 78.

In Commonwealth *v.* Uhrig, 146 Mass. 132, 15 N. E. 156, it was held that the fact that the defendant keeps posted in his premises a United States tax receipt, running to him as a dealer in spirituous or intoxicating liquors, is competent evidence that he keeps the premises for the sale of liquor, irrespective of the provisions of Massachusetts statute of 1887, c. 414, which makes the posting of such receipt prima facie evidence that the person named therein keeps for sale and sells such liquors, the statute being merely declaratory of the common law, and valid. In that case, the only ruling was that the evidence was admissible. No ruling was asked or given as to the weight or effect of the evidence.

On trial for violation of the local option law, a United States revenue license taken out by defendant, and bearing date prior to the

filing of the complaint, and what was posted in his place of business, was admissible in evidence against him, whether or not it was shown to have been in his possession prior to the filing of the complaint. Martin *v.* State (Tex.), 61 S. W. 486.

Where, in a prosecution for violating the local option law, it was claimed that defendant was doing business with Q., evidence that Q. had a retail liquor dealer's license granted by the federal government was material. Suggs *v.* State (Tex.), 101 S. W. 999.

On a trial for an illegal sale of liquor in person, where defendant testified that, while he had liquor for sale, he never sold it himself, the state might show that he had a revenue license to sell liquor. Clark *v.* State (Tex.), 49 S. W. 85.

Establishing Fact of Issuance.—On a prosecution for violating a local option law, the taking out of an internal revenue license may be shown by a certified copy, made by a third person, of entries in a book kept in the internal revenue office, and showing all licenses issued in defendant's district for selling liquors at retail. Gerstenkorn *v.* State (Tex.), 44 S. W. 501.

In a prosecution for violating the local option law, a witness, having investigated the internal revenue books, was entitled to testify that they disclosed that a retail liquor dealer's license had been issued by the government to a person with whom it was claimed defendant was engaged in business. Sugg *v.* State (Tex.), 101 S. W. 999.

Admissibility of Evidence to Show Purpose for Which License Was Procured.—On prosecution for illegal sale of liquors, where defendant, on cross-examination, was compelled to state that he took out a United States revenue license to sell "malt" liquors, it was not error to refuse to permit him to explain the circumstances under which he procured it. Barnes *v.* State (Tex.), 44 S. W. 491; Fruidie *v.* State (Neb.), 92 N. E. 320.

On the trial of an indictment for maintaining a place used for illegal keeping and sale of intoxicating liquors, the government, in order to show that the defendant intended to use and did use the place for that purpose, having introduced evidence that he took a license from the United States to sell such liquors there, held, that evidence was admissible, in the defendant's behalf, of what passed between him and the assessor of internal revenue, at the time when he applied for the license, in order to show the reasons and purpose for which he took it. Commonwealth *v.* Austin, 97 Mass. 595.

The defendant was tried upon an indictment charging him with keeping and maintaining a liquor nuisance. The state proved that during the period covered by the indictment the defendant had paid a United States special tax as a retail liquor dealer. The defendant offered to show the circumstances in relation to his taking out this license, and why the tax had been paid by him, which evidence was excluded. The fact of the payment of this special tax is equivalent to an admission claimed to have been made; but it is always competent, not only to deny the fact of an admission, but, as well, to explain its significance by showing other facts which may have that effect. The real question as to the importance and weight of the fact of the payment of this tax is as to the intent of the person who made the payment at the time, and, whenever the intent of a person is relevant to the issue, that person may testify as to what his intention was, although the value of such testimony is always for the jury. Held, that the defendant was entitled to make an explanation of the fact relied upon by the state, and to have the jury consider it in connection with that fact. State *v.* Morin (Maine), 66 Atl. 650.

Admissibility of Evidence to Show That Accused Had No United States License.—In Anderson *v.* State (Tex.), 37 S. W. 859, the accused attempted to show that she had not violated the liquor laws, by offering evidence to the effect that she had no United States license, but the court said "It would be wholly immaterial whether the defendant had obtained a United States revenue license or not, if she pursued the occupation of selling intoxicating liquors; and she could not defend against a violation of the state law because she had not complied with the United States internal revenue laws."

Duty of Revenue Commissioner to Give Evidence as to Licenses.—An instruction issued by the commissioner of internal revenue, directing collectors and their deputies to refuse to produce, in criminal prosecutions of liquor dealers in the state courts, the returns made to the collectors, or the lists showing payments of federal liquor taxes, or to give information derived from official sources as to the fact of such payments, is valid, and in accordance with the federal laws. Rev. St., U. S., §§ 251, 321, 3238, 3240, 3244. The state has no right to federal instruments of purely federal character for proof, unless they are left within its reach. In re Weeks, 82 Fed. Rep. 729.

Weight and Sufficiency.—"The statutes of North Carolina provide that the issuance to any person of a license to manufacture or sell spirituous or malt liquor by the United States government in any county or city where the manufacture or sale of such liquor is forbidden by state law shall be prima facie evidence that the person having such license is guilty of doing the act permitted thereby, in violation of the state law. State *v.* Dowdy (N. C.), 58 S. E. 1002; State *v.* Toler (N. C.), 58 S. E. 1005.

And in Maryland it has been held that the fact that the traverser had a government license to sell liquors in a county was prima facie evidence that he was engaged in the business of selling liquors. Guy *v.* State, 96 Md. 692, 54 Atl. 879.

In Mississippi the court in Burnett *v.* State, 72 Miss. 994, 18 So. Rep. 432, used the following language "The court properly admitted evidence of the fact that appellant had paid the license fee, and secured the stamp from the United States, authorizing him to sell intoxicating liquors. This license was of no value to the defendant unless he intended to do the acts it authorized, and that he prepared to engage in retailing liquor by securing the stamp, and kept it exposed to view as one actually engaged in that business was required by the act of congress to do, is strongly suggestive of the fact that he was actually selling intoxicants. While the question under investigation was whether the appellant was guilty of making the particular sale testified to by the state's witness, the strong probative force of the contested evidence made it relative to the issue being tried."

In Kentucky in the case of Throckmorton *v.* Commonwealth (Ky.), 49 S. W. 474, it was held no error to permit the commonwealth's attorney to ask accused whether he had a government license to sell whiskey at the time of the offense, as an affirmative answer would tend to show that he had whiskey in his possession.

In Iowa, under the direct provisions of Code, § 2427, the fact that defendant had paid for a government license to sell intoxicating liquors was presumptive evidence that she was engaged in keeping for sale or selling contrary to law. Colby *v.* Fitzgerald (Iowa), 94 N. W. 491.

In Massachusetts it is provided that the posting on the premises of a "United States tax receipt as a dealer" in certain liquors, shall be prima facie evidence that he or his agent in charge "keeps for sale and sells such liquors." Commonwealth *v.* Uhrig, 146 Mass. 132.

"If the defendant had taken a license to sell intoxicating liquors at a certain place, it would so far show that he had made preparations to carry on the business there, and would be a circumstance somewhat similar in its nature to the putting up of his sign over the door, or procuring the ordinary implements of the traffic." Commonwealth *v.* Keenan, 11 Allen (Mass.) 262.

But in Maine the defendant cannot be found guilty of being a common seller of intoxicating liquors simply because he has paid the tax as a retail liquor dealer; but the jury must be satisfied of his guilt beyond a reasonable doubt. Following State *v.* Liquors, 80 Me. 57, 12 Atl. 794; Leavitt *v.* Baker, 82 Maine 26, 19 Atl. Rep. 86.

In Texas it was held, where, in a prosecution for violating the local option law, it was shown that the defendant sold whiskey, it was not error to instruct that the finding of a United States internal revenue license in the place where the sale was made was prima facie proof that the holder thereof was engaged in the sale of intoxicating liquor. Magee *v.* State (Tex.), 98 S. W. 245. See, also, Floeck *v.* State, 34 Tex. Cr. R. 314, 30 S. W. 794; Gerstenkron *v.* State, 38 Tex. Cr. R. 621, 44 S. W. 503; Thompson *v.* State (Tex.), 97 S. W. 316.

But in Barnes *v.* State (Tex.), 44 S. W. 491, it was held, not to constitute error to charge that the mere possession by defendant of such internal revenue license would not authorize a conviction, but is to be considered with all the other evidence, and as a part of the same, in determining whether defendant was guilty of the offense charged.

In Peyton *v.* State (Ark.), 102 S. W. 1110, it was held, that a certificate of the collector of internal revenue of the district that defendant's name appeared on his list as having paid the special tax as a retail liquor dealer was the officer's mere ex parte statement, and was neither admissible nor prima facie proof that defendant was keeping a "blind tiger."

In a prosecution for violating Rev. St., art. 5060a, as amended by the 25th legislature, requiring a license for selling intoxicating liquors on physician's prescriptions in a local option district, possession of an internal revenue license, while prima facie proof of the sale of the liquor in question, is not proof that defendant was engaged in selling liquor on prescriptions in a local option district. Williamson *v.* State, 41 Tex. Cr. Rep. 461, 55 S. W. 568.

In a prosecution for violating the local option law, the possession of an internal revenue license, as required by the laws of the United States, for the sale of malt liquors, by defendant, is not conclusive evidence that he was a dealer in intoxicating liquors. Denton *v.* State (Tex.), 105 S. W. 199; Thompson *v.* State (Tex.), 97 S. W. 316; Uloth *v.* State, 13 Tex. Ct. Rep. 521, 87 S. W. 822.

WOODSON *v.* COMMONWEALTH.

Jan. 16, 1908.

[59 S. E. 1097.]

1. Rape—Assault with Intent to Rape—Elements.—A charge of assault with intent to rape can only be established by proof of force or attempted force, coupled with an attempt to have sexual intercourse with prosecutrix against her will and notwithstanding her resistance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 15-19.]